

*a***NANDAKUMAR GOVINDASAMY****v.****PP***b*

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPEAL NO: K-05-45 OF 1997]
12 JANUARY 1999

c

CRIMINAL PROCEDURE: *Trial - Jury trial - Murder - Charge amended to culpable homicide not amounting to murder - Whether jury to be discharged - Whether court to proceed with trial summarily - Penal Code ss. 302, 304 - Criminal Procedure Code Chapter XX*

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The appellant was originally charged with murder under s. 302 Penal Code and tried in the High Court before a judge and jury. Before the conclusion of the trial, however, the prosecution reduced the charge to one of culpable homicide not amounting to murder under s. 304 Penal Code, and following that, the learned judge discharged the jury and proceeded with the trial in a summary way. The learned judge then convicted the appellant on the reduced charge and sentenced him to 15 years' imprisonment. The appellant appealed and argued that, upon the authority of *Khalid Panjang & Ors v. PP*, the learned judge ought to have proceeded with the trial of the lesser charge in the presence of the jury, and that the learned judge had therefore erred in law when he discharged the jury and proceeded with the hearing in the summary way.

*e**f***Held:****Per Shaik Daud Ismail JCA***g*

[1] It is unfortunate that *Khalid Panjang's* case does not give the facts of the case. This court is therefore in no position to see what transpired in that case which gave rise to the principle referred to. In the circumstances, the broad principle in *Khalid Panjang's* case cannot be applied to the facts of the present case.

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[2] The facts of the present case are on all fours with the facts in *Yau Heng Yang v. PP*. Bearing in mind this Supreme Court decision, it is clear that, whenever a charge for murder is amended to a lesser charge that does not carry the death sentence, the proper procedure is for the trial judge to discharge the jury and proceed to hear the case under Chapter XX of the Criminal Procedure Code.

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[3] In the circumstances, the learned judge had properly discharged the jury when the murder charge was amended to one of culpable homicide not amounting to murder and in proceeding with the trial without jury. The trial was not a nullity.

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[Appeal on conviction dismissed but appeal on sentence allowed; sentence of imprisonment reduced to 12 years.]

b

[Bahasa Malaysia Translation Of Headnotes]

Perayu pada asalnya dituduh dengan kesalahan bunuh di bawah s. 302 Kanun Keseksaan dan dibicara di Mahkamah Tinggi di hadapan seorang hakim dan juri. Bagaimanapun, sebelum perbicaraan berakhir, pendakwa telah meminda pertuduhan kepada satu kesalahan homisid salah yang bukan membunuh di bawah s. 304 Kanun Keseksaan, dan berikutan itu, hakim yang bijaksana membebaskan pihak juri dan meneruskan perbicaraan tanpa juri. Hakim yang bijaksana kemudian mensabitkan perayu atas pertuduhan yang dipinda dan seterusnya menjatuhkan hukuman 15 tahun penjara. Perayu merayu dan berhujah bahawa, berdasarkan autoriti *Khalid Panjang & Ors v. PP*, hakim yang bijaksana seharusnya meneruskan perbicaraan atas pertuduhan terpinda dengan kehadiran juri, dan bahawa hakim yang bijaksana, dengan itu, adalah tersilap di sisi undang-undang bilamana beliau membebaskan juri dan meneruskan perbicaraan secara sendirian tanpa juri.

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Diputuskan:

Oleh Shaik Daud Ismail HMR

[1] Adalah agak malang bahawa kes *Khalid Panjang* tidak menerangkan fakta-fakta kes tersebut. Mahkamah ini dengan itu tidak dapat meninjau apa yang berlaku dalam kes tersebut yang mewujudkan prinsip yang dirujuk dalam itu. Dengan itu, prinsip umum dalam kes *Khalid Panjang* tidak boleh digunakan kepada fakta-fakta kes semasa.

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[2] Fakta kes di sini adalah sama dengan fakta dalam kes *Yau Hen Yang v. PP*. Mengambil kira keputusan Mahkamah Agung tersebut, ianya jelas bahawa, apabila sesuatu pertuduhan bunuh itu dipinda kepada pertuduhan yang lebih ringan yang tidak melibatkan hukuman mati, maka prosedurnya yang teratur ialah bagi hakim perbicaraan membebaskan juri dan meneruskan perbicaraan di bawah Perenggan XX Kanun Tatacara Jenayah.

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[3] Dengan yang demikian, hakim yang bijaksana telah bertindak dengan teratur apabila beliau membebaskan juri apabila pertuduhan bunuh dipinda kepada pertuduhan homisid salah yang bukan membunuh dan dalam meneruskan perbicaraan tanpa juri.

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[Rayuan terhadap sabitan ditolak tetapi rayuan terhadap hukuman dibenarkan; hukuman pemenjaraan dikurangkan ke 12 tahun.]

a Cases referred to:

Khalid Panjang & Ors v. PP [1964] 30 MLJ 67 (refd)

Yau Heng Fang v. PP [1985] 2 CLJ 22 (refd)

Legislation referred to:

Criminal Procedure Code, s. 200(ii)

b Penal Code, ss. 302, 304

For the appellant - Karpal Singh; M/s Karpal Singh & Co

For the respondent - Zaayah Be Loth Khan DPP

[Appeal from High Court, Alor Setar; Criminal Appeal Kedah No: 45-14-1994]

c *Reported by WA Sharif*

JUDGMENT

Shaik Daud Ismail JCA:

- d** The appellant was originally jointly charged with three others for the offence of murder under s. 302 of the Penal Code, in the High Court at Alor Setar. He and three others pleaded not guilty and the trial commenced before a panel of jury on 8 June 1996. After the tenth witness had testified, the prosecution tendered an amended charge for an offence of culpable homicide not amounting to murder under the first limb of s. 304 of the Penal Code.
- e** The amended charge was read and explained to the appellant and his three co-accused. The three co-accused pleaded guilty to the amended charge and they were accordingly sentenced. The appellant, however, claimed to be tried. Thereupon the learned judge discharged the jury and proceeded with the rest of the trial in a summary way.
- f** In view of the amended charge, the learned judge asked learned counsel representing the appellant whether he desired to recall any of the witness already called and the reply was in the negative. At the continued hearing two of the co-accused became crown witnesses. At the conclusion of the trial the appellant was convicted on the amended charge and sentenced to fifteen years' imprisonment from the date of his arrest. The facts leading to the conviction of the appellant are not relevant for the purpose of the present appeal which is an appeal on a pure point of law.
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Mr. Karpal Singh for the appellant submitted that the learned judge erred in law when pursuant to the amendment of the charge he discharged the jury and proceeded with the rest of the hearing in a summary way. He contended that the learned judge ought to have proceeded with the trial in the presence of the jury in spite of the amendment to the charge. He argued that the finding of facts up to the tenth witness had to be decided by the jury as judges of facts and this function cannot be usurped by the learned judge. He referred us to a 1964 Federal Court decision of *Khalid Panjang and Ors. v. Public Prosecutor* [1964] 30 MLJ 67, and contended that the principle therein ought to apply in the present case. In *Khalid Panjang's* case the then Federal Court held as follows:

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At some stage prior to the commencement of a trial in the High Court the question of the mode of trial must be decided ie, whether it is to be by jury or by a judge alone. The criterion, contained in section 200 of the Criminal Procedure Code is that “in all cases where the punishment of death is authorised by law the accused shall be tried by jury”. The only practicable time at which the criterion is to be applied is the commencement of the trial.

Once a trial has been commenced before a jury it can only be terminated, apart from questions of irregularity and so forth, by a verdict of the jury which must be either that the accused person is guilty or not guilty of either the offence with which he was originally charged or any other offences for which he could be convicted on the original charge by reason of the provisions of the Code as a whole.

Based on the above, Mr. Karpal Singh contended that on the fact of the present case, in spite of the amendment of the charge, the learned judge ought to have proceeded with the hearing in the presence of the jury until it is terminated by the verdict of the jury.

It is unfortunate that *Khalid Panjang*’s case does not give the facts of the case. Therefore we are in no position to see what transpired in that case which gave rise to the principle referred to. We do not know what the charge was, as in 1963, quite a number of offences were triable with a jury then. We also do not know at what stage of the proceedings the charge was amended and by whom. The charge may well have been amended by the court itself as the last paragraph of the report seems to suggest. Therefore, we are of the view that the broad principle in *Khalid Panjang*’s case cannot be applied to the facts of the present case. It is our view that the facts of the present case are on all fours with the facts in another case referred to by the learned Deputy Public Prosecutor. The circumstances found in *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] 2 MLJ 335 are similar to the present case before us. In that case, as in the present case, the appellant had originally been charged for murder under s. 302 of the Penal Code and tried in the High Court before a judge and jury. At the close of the prosecution the charge was amended to one of culpable homicide not amounting to murder under s. 304 of the Penal Code. Thereupon the jury was discharged and the trial continued with the judge sitting alone. He was convicted on the reduced charge and sentenced to 10 years’ imprisonment. He appealed to the Supreme Court. The principal ground of appeal was that the trial was a nullity on the ground that the appellant having been given in charge to the jury in accordance with s. 200(ii) of the Criminal Procedure Code, the remaining provisions of Chapter XII of the Code including the requirement for the jury to return a verdict was never complied with and as such the appellant was not lawfully convicted and sentenced. The appeal was, however, allowed not on the principal ground but on the issue of

- a* the identity of the appellant not having been satisfactorily proved and the learned judge's rejection of the defence of alibi. On the principal ground Mohamed Azmi SCJ (as he then was) at p. 337 states:

- b* In practical terms jury trial is available in this country only where the charge is murder under s. 302 Penal Code and where the trial is held in West Malaysia. In the present appeal, the appellant was properly tried before a jury when the charge against him was one for murder. But when the charge was reduced to s. 304 at the close of case for prosecution, the offence ceased to carry the death penalty and by virtue of s. 200 Criminal Procedure Code the appellant should no longer be tried before a jury. The requirement of s. 232(i) for the jury to return a verdict "on all the charges on which the accused is tried" must be read in the context of s. 210(ii) ie, charges upon which the accused has been arraigned when the registrar gives the accused in charge to the jury, and by virtue of s. 200 such charges can only relate to offences punishable with death. It is therefore our judgment that whenever a charge of murder is amended to a lesser charge which does not carry the death sentence,
- d* the proper procedure to be adopted is for the trial judge to discharge the jury and proceed to hear the case under Chapter XX of the Criminal Procedure Code. In the circumstances, we are of the view that the learned judge was correct in law in discharging the jury after the charge was amended and in proceeding to hear the case without jury.

- e* Learned counsel further argued that *Khalid Panjang's* case was never cited in the Supreme Court during the *Yau Heng Fang* appeal. It is our view that in the light of the vagueness of facts in *Khalid Panjang's* case, it would not have made any impact in the decision of the Supreme Court. In any event, the main thrust of the Supreme Court's decision is that whenever a charge for murder is amended to a lesser charge that does not carry the death sentence, the proper procedure to be adopted is for the trial judge to discharge the jury and proceed to hear the case under Chapter XX of the Criminal Procedure Code.
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- g* We are of the view that in the circumstances of the present appeal and in the light of the Supreme Court decision in *Yau Heng Fang*, the learned judge properly discharged the jury when the murder charge was amended to one of culpable homicide not amounting to murder and in proceeding with the trial without jury. We hold that in the circumstances the trial was not a nullity. It is also to be noted in passing that such a situation will not arise again since Chapter XXII of the Criminal Procedure Code pertaining to trials by jury had been abolished by the Criminal Procedure Code (Amendment) Act 1995 (Act A 908/95).
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- i* We dismissed the appeal on conviction but allowed the appeal on sentence. After hearing submissions on sentence we reduced the sentence to 12 years to take effect from the date of the arrest.